Supreme Court, U.S.
F I L E D
NOV 16 1993
OFFICE OF THE CLERK

NO. 93-305

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. BLANKSTYN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. BLANKSTYN
16213 SOUTH 35TH STREET
PHOENIX, ARIZONA 85044
(602) 759-9024
Petitioner, In Propria Persona

Date: November 16, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Notice of Deficiency is sufficient when the Notice, that was given under the provisions of IRC, Section6212(a) was not received until 383 days after the date of the Notice, due to Postal Service error in the delivery of the Notice.

2. Whether the 90-day period, provided for under the provision of IRC, Section6213(a), otherwise began to run upon actual receipt of the Notice of Deficiency, where the Notice was not received until 383 days after the date of the Notice, due to Postal Service error in the delivery of the Notice.

THE PARTIES

The only parties are those who appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
THE PARTIES ii
TABLE OF AUTHORITIES iv
STATUTES AND REGULATIONS iv
ARGUMENT 2

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WHICH FOUND THAT THE NOTICE OF DEFICIENCY WAS SUFFICIENT, WHEN EVIDENCE SHOWED THAT THE NOTICE WAS NOT RECEIVED DUE TO POSTAL SERVICE ERROR IN DELIVERY OF THE NOTICE IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEAL 2

II. THE FAILURE OF THE TAX COURT AND APPELLATE COURT TO CONSIDER THAT THE 90-DAY PERIOD FOR PETITIONING THE UNITED STATES TAX COURT BEGAN UPON THE PETITIONER'S ACTUAL RECEIPT OF THE NOTICE OF DEFICIENCY IS AN IMPORTANT QUESTION OF LAW WHICH AS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT 9

CONCLUSION 11

TABLE OF AUTHORITIES

CITATION	PAGE
Balkissoon v. Commissioner, 995 F.2d 525 (4th Cir. 1993)	3-6
Clodfelter v. Commissioner, 527 F.2d 754 (9th Cir. 1975)	10
McKay v. C.I.R., 886 F.2d 1237, 1239 (9th Cir. 1989)	10
Mulvania v. C.I.R., 769 F.2d 1376 (9th Cir. 1985)	10
Mulvania v. Commissioner, 81 TC 65 (1983)	5, 6
Powell v. United States, 958 F.2d 53 (4th Cir. 1992)	3, 5
Pyo v. Commissioner, 83 TC 626 (1984)	5, 6

STATUTES AND REGULATIONS

SECTION	PAGE
IRC, Section6212(a)	2, 4, 7
IRC, Section6213	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. BLANKSTYN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, William C. Blankstyn, hereby submits this Reply Memorandum in Support of his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 19, 1993.

The statement for the location of the opinions from the lower court, the statement of this Court's jurisdiction and the statement of facts are fully set forth in the Petition.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, WHICH FOUND THAT THE NOTICE OF DEFICIENCY WAS SUFFICIENT, WHEN EVIDENCE SHOWED THAT THE NOTICE WAS NOT RECEIVED DUE TO POSTAL SERVICE ERROR IN DELIVERY OF THE NOTICE IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURT'S OF APPEAL

The Petitioner argues that the Notice of Deficiency was not received by him due to Postal Service error in the mailing of the Notice. The Ninth Circuit, in rendering its decision in this case, placed itself in conflict with other circuits and the Tax Court, when it held that once the IRS mailed the Notice to the Petitioner's "last known address" it was sufficient to meet the requirements of IRC, Section 6212(a), whether the Petitioner received the Notice or not.

In every circumstance where error in delivery was beyond control of the taxpayer, the other circuits and the Tax Court have held that such an error rendered the Notice invalid. The most recent support for this

proposition was found in *Powell v. United States*, 958 F.2d 53 (4th Cir., 1992).

In response to the Petition, the Respondent argues that the Fourth Circuit's recent decision in *Balkissoon v. Commissioner*, 995 F.2d 525 (4th Cir., 1993) leaves doubt that *Powell* is correct statement of law in that circuit. (Res. Brf. at Page 6). The Respondent misrepresents the holding in *Balkissoon*.

In *Balkissoon*, the Commissioner mailed the Notice of Deficiency by regular first class mail. The Balkissoon's received the Notice and timely petitioned Tax Court. The issue was whether it was permissive or mandatory for the Commissioner to send the Notice of Deficiency via certified or registered mail. In concluding that IRC, Section 6212(a) made it permissive for the Commissioner to send the Notice via certified or registered mail, the Court stated as part of its holding that;

> "If the taxpayer actually does receive notice of deficiency by some method of delivery, the Commissioner's failure to comply with the authorization in section 6212(a) inviting the use of registered or certified mail proves to be a technical, but harmless violation.
>
> The circuits that have addressed this issue directly all have reached this conclusion, holding in essence that "a notice of deficiency that is actually received without delay prejudicial to the taxpayer's ability to petition

> the Tax Court is sufficient to toll the statute of limitations as of the date of mailing." *id.* at 528

The Fourth Circuit found that the Balkissoon's were not prejudiced by the fact that the Notice had been sent by regular mail, because they admittedly received the Notice and timely petitioned Tax Court. However, the Fourth Circuit left no doubt that the outcome would have been substantially different had the Balkissoons not received the Notice in time to petition the Tax Court.

It is clear that *Powell* and *Balkissoon* are distinguishable. The Petitioner submits that the Fourth Circuit would continue to affirm *Powell* if the facts before it show that there was prejudicial delay in the receipt of the Notice of Deficiency, where the delay was caused by circumstances beyond the control of the taxpayer, even if the Notice was mailed to the taxpayer's last known address.

The Respondent attemts to argue that *Pyo v. Commissioner*, 83 TC 626, 639 (1984); *Mulvania v. Commissioner*, 81 TC 65, 70 (1983), because the record showed that the Notices were sent to the wrong address. As the Petitioner pointed out in the Petition, *Pyo* and *Mulvania* are applicable for the "**general**" proposition that "If mailing ***does not*** result in **actual** notice of a tax deficiency, because 'the notice is sent to the wrong address and never delivered, ***or delivered with prejudicial***

delay, **the statutory purpose is not served** and it would be **manifestly unfair** to deny the taxpayer his prepayment hearing.'" (emphasis added). Thus, just as the *Balkissoon*, upon which the Respondent relies so heavily in its response to the Petition, has some application for the "**general**" propostion that a notice is sufficient if it is sent by certified or registered mail, even if it is not received by the taxpayer. *Pyo* and *Mulvania* are both applicable when evidence shows that the delivery of the Notice is delayed by circumstances beyond the control of the taxpayer, even if the Notice contains the proper address.

Upon summary of the facts of this case, which are set forth in the Petitioner's uncontroverted affidavit that was filed in the Tax Court[1], this Court will see that the Ninth Circuit's conclusion that the requirements of IRC, Sections 6212 and 6213 because the notice was 'mailed' to the Petitioner at his "last known address" is in conflict with at least the Fourth Circuit. The facts show that it was the Postal Service's mishandling of the 1985 Notice of Deficiency that resulted in the Petitioner's non-receipt of the Notice of Deficiency. They show that he received the Notice of Deficiency for 1986, but not for 1985. They also show that the notices for both years were mailed the same date, that the certified mail numbers

---

1/ Appendix E, Attached to Petition.

were sequential, and that, although the Petitioner received the 1986 Notice of Deficiency, the Postal Service records showed that both the 1985 and 1986 Notices were returned to the Internal Revenue Service in Ogden, Utah with the "unclaimed" annotation. Thus, the facts show that there was "**prejudicial delay**" in the delivery of the Notice caused by Postal Service.

The Commissioner cannot claim total innocence in this case. As the Affidavit in Appendix E to the Petition at 6 shows, the Petitioner wrote to Marc Garcia with more than 30 days remaining on the petition time and asked if the Notice for 1985 had issued and if it had why had the Petitioner not received it. The Petitioner received no response from anyone.

Because the record shows that delivery was delayed by the Postal Service the 1985 Notice is either insufficient.

II. THE FAILURE OF THE TAX COURT AND APPELLATE COURT TO CONSIDER THAT THE 90-DAY PERIOD FOR PETITIONING THE UNITED STATES TAX COURT BEGAN UPON THE PETITIONER'S ACTUAL RECEIPT OF THE NOTICE OF DEFICIENCY IS AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN SETTLED BUT SHOULD BE SETTLED BY THIS COURT

The record of this case also shows that the first time the Petitioner actually knew of the Notice of Deficiency was when he received it as an attachment to the Respondent's response to the Petitioner's Motion for Preliminary Injunction filed in the district Court in *Blankstyn v. United States*, CIV 91-0452 PHX CAM, District of Arizona.

In the alternative to declaring the Notice insufficient as set forth in Argument I, the Court should declare that the 90 day period for petitioning the Tax Court began to run upon the Petitioner's actual receipt of the Notice of Deficiency. In response the Respondent argued that the Court in *McPartlin* based its decision "solely upon the peculiar facts and circumstances of this case." *Id.* at 1193. The Petitioner submits that this case warrants the same consideration and the case should have been decided on the peculiar facts and circumstances which show that the non-receipt of the Notice of Deficiency was beyond the control of the Petitioner.

It should not have been decided on the "**general**" principal that the notice was valid because it was mailed to the "last known address." The general principal should be that "Notice is sufficient if it is mailed to the "last known address" and there is no prejudicial delay in the delivery. *McKay v. C.I.R.* 886 F.2d 1237, 1239 (9th Cir., 1989); *Mulvania v. C.I.R.* 769 F.2d 1376 (9th Cir., 1985); *Clodfelter v. Commissioner*, 527 F.2d 754, 756 (9th Cir., 1975).

CONCLUSION

The evidence shows that the Postal Service mishandled the Notice of Deficiency for 1985 resulting in the Petitioner's non-receipt of it. The circumstances were beyond the control of the Petitioner and were prejudicial to his rights. The district Court chose to ignore the facts and of the Postal Service's mishandling and rendered a decision in conflict with other circuits.

Under the peculiar facts and circumstances of this case this Court should either declare the Notice of Deficiency for 1985 invalid or in the alternative declare that the 90 day period began to run when it was actually received by the Petitioner.

Accordingly, this Court should grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of November, 1993.

WILLIAM C. BLANKSTYN
16213 South 35th Street
Phoenix, Arizona 85044
(602) 759-9024
PETITIONER, IN PROPRIA PERSONA